Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-226

MELVIN V. MOODY,
Petitioner,

v.

STATE OF KANSAS [redacted]
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF KANSAS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

MELVIN V. MOODY,
Petitioner,

v.

STATE OF KANSAS and
CURT T. SCHNEIDER, as Attorney General
of the State of Kansas,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The Petitioner, Melvin V. Moody, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Supreme Court of the State of Kansas rendered in these proceedings on April 1, 1978, and the Order of that Court denying a Petition for Rehearing rendered on May 10, 1978.

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Kansas reported as State v. Moody, 223 Kan. 699, ___P.2d___ (1978) appears at Appendix A. The Order of the Supreme Court denying a Petition for Rehearing is unreported and appears at Appendix B.

JURISDICTION

The Supreme Court of the State of Kansas entered its Opinion and Judgment on April 1, 1978, and that Court entered an Order denying a Petition for Rehearing on May 10, 1978.

This Petition for Certiorari was filed less than ninety (90) days from the date the Supreme Court of the State of Kansas entered the Order denying the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

The Petitioner was convicted of conspiracy to commit aggravated burglary and aggravated robbery under the laws of the State of Kansas and his conviction rested upon the testimony of an alleged coconspirator whose Constitutional rights under the Fifth Amendment to the United States Constitution were admittedly violated by law enforcement officers before he made statements involving the Petitioner in the offenses with which he was subsequently charged and tried. The questions arising in this case are:

1. Whether the trial court and the Supreme Court of the State of Kansas ~~were~~ correct in holding that the Petitioner had no standing to suppress incriminating testimony by a coconspirator on the ground that such testimony came as a direct result of the violation of the coconspirator's Fifth Amendment right against self-incrimination.

2. Whether due process ~~under the~~ Fourteenth Amendment to the United ~~States~~ ~~Constitution~~ required the suppression of incriminating testimony by a coconspirator when it was shown that such testimony was obtained as a direct result of a violation of the coconspirator's Constitutional right against self-incrimination and while improperly under the control of law enforcement officials.

3. ~~Whether~~ due process ~~under the~~ Fourteenth Amendment to the United States Constitution required, under the circumstances related in the first two questions, a cautionary instruction to be given to the jury as to the coconspirator's testimony.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF FACTS

On December 4, 1975, a jury in the District Court of Sedgwick County, Kansas, convicted the Petitioner of conspiracy to commit aggravated burglary and aggravated

robbery. The conviction rested on the testimony of Ray Meeks, an alleged accomplice, which fact was recognized on appeal by the Kansas Supreme Court when it said, "the state's case stood or fell on whether the jury believed Meeks." During closing argument the prosecutor told the jury that "(a)s I'm sure you're aware at this point, the state's case turns principally upon the testimony of its main witness, Ray Emerson Meeks, not a particularly wonderful man."

Prior to trial, and on June 18, 1975, the Petitioner filed an Amended Motion to suppress the testimony of Meeks. One of the specific grounds relied upon was that his testimony was obtained in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and that the use of such testimony would violate Petitioner's right to a fair trial. Record on Appeal at 7,8. On October 24, 1975, this Motion was heard in chambers without a record being taken and was overruled by the State District Court Judge on the ground that the Petitioner had no standing to assert the constitutionality of the manner in which law enforcement officials questioned Meeks. Later, on appeal, the State stipulated that the Constitutional rights of Meeks had been violated and, with respect to the Petitioner's Amended Motion to suppress, further stipulated:

> The parties appeared before Judge Howard Kline on June 25, 1976, and agreed to the following stipulation. Pursuant to Kansas Supreme Court Rule 6(m), and for the purpose of the Motion to Suppress and this Stipulation, it is agreed and stipulated by the parties that the constitutional

rights of Ray Emerson Meeks were violated.

In June, 1975, a motion to suppress the testimony of Ray Emerson Meeks was filed by defendant Moody. The motion was heard in chambers by Judge Howard Kline on October 24, 1975. No stenographic record of the hearing was made.

The motion was presented to the Court on an agreed statement of facts formulated by James F. Foster, attorney for defendant, and Stephen M. Joseph, Assistant District Attorney, attorney for Plaintiff. The statement of facts is as follows:

> Ray Emerson Meeks, Elmer Hardyway, and Donald McQueen were arrested at 2:00 a.m. on Sunday, March 9, 1975. All three men had prior felony convictions and they were in possession of three firearms when they were arrested. Meeks was informed that he did not have to make a statement. He stated that he did not want to make a statement and did not do so. On the following Monday, Tuesday, Wednesday, and Thursday, Meeks was taken from the Sedgwick County Jail each morning to the Wichita Police Department and after again being warned that he did not have to answer, was questioned by several police detectives until approximately 8:00 p.m.. Prior to each

questioning period Ray Emerson Meeks stated he did not want to make a statement. The questioning covered several crimes, including the murder of Willie Stephens, several aggravated burglaries, several aggravated robberies, several kidnappings, several gun law violations, and various conspiracies. Meeks was told that his brother was a suspect in a murder occurring in Sedgwick County. Meeks was very close to his brother and they were protective of each other. Meeks told the police detectives nothing except some manufactured stories until Thursday. On Thursday, Meeks was told by the police that if he would tell the truth and testify against the persons who participated with him in various crimes, he would be granted immunity. He was further advised that a co-defendant had given a full statement, though was not advised that it did not contain any incriminating or exculpatory material. Meeks then made a statement to the police which resulted in multiple charges against Elmer Hardyway, Donald McQueen and Stephen Smallwood.

Approximately ten days later, Meeks, who was then at liberty on an appearance bond, voluntarily appeared in the District Attorney's Office to make a statement to Stephen M. Joseph, Assistant District Attorney, concerning Meeks' participation in several crimes. At that time,

Mr. Joseph first learned that Meeks had retained Ted O'Hara as his lawyer. Meeks called Mr. O'Hara from the District Attorney's Office and advised Mr. O'Hara that he could not afford to retain an attorney and that Mr. O'Hara was discharged. Later that day, the Honorable Dan Dwyer, Judge of the Court of Common Pleas, appointed an attorney to represent Meeks. This attorney never met or spoke with Meeks. In making his statement to Mr. Joseph, Meeks gave information which resulted in a conspiracy charge being filed against defendant Moody.

> Pursuant to the agreement with Meeks, all charges against him were dismissed by the District Attorney's Office.
>
> After hearing this statement of facts and argument of counsel, Judge Kline ruled that defendant Moody had no standing to question the constitutionality of the actions of the Wichita Police Department in questioning Meeks.

Record on Appeal at 15,16.

Before the jury was instructed by the trial court, counsel for the Petitioner made a timely request that the following instruction, from Section 52.18 of the Pattern Instructions for Kansas, be used:

> An accomplice witness is one who testifies that he was involved in the commission of the crime with which the Defendant is charged. You should consider with caution the uncorroborated testimony of an accomplice witness.

Record on Appeal at 13.

The trial Judge refused to give this instruction on the grounds that this instruction was ". . . nothing but a naked comment by the Court as to the credibility of a specific witness; it contains no law as such, and is entirely a matter of, I consider, improper interferring with the tryer of fact by the tryer of law in the guise of giving them an instruction on the law. . . ." Thus, the Judge, in refusing to give the instruction, considered its use ". . . meddling by the trial judge with the jury, . . ." Record on Appeal at 96,97.

The evidence also reflected that following Meeks' release from jail, and after he "voluntarily" appeared at the prosecutor's office, the prosecutor spent fifty to fifty-five hours in questioning with Meeks. Admittedly, Meeks gave statements concerning other crimes during these interviews.

On appeal, one of the issues presented by the Statement of Points on Appeal, was, again, whether the testimony of Meeks should have been suppressed because of the violation of his Constitutional rights and a resulting denial of the Petitioner's right to a fair trial. Specifically, the Petitioner contended that "[t]he Court erred by not prohibiting the testimony of Ray Emerson Meeks and in ruling that the unconstitutional conduct by the Police Department in

the securing of the statement by Ray Meeks was not a deprivation of the Defendant's right to a fair trial." Record on Appeal at 17.

The record does not reflect that Constitutional grounds were argued to the trial court as a ground for giving Petitioner's requested cautionary instruction. However, on appeal, the Petitioner asserted, in his Brief, that the failure to give such instruction violated his right to due process under the Fourteenth Amendment. Brief of Appellant at 9-12. This question would also appear to be inherently raised by the other Constitutional questions presented to the Courts below.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER HAS STANDING TO RAISE THE VIOLATION OF AN ALLEGED COCONSPIRATOR'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION WHEN THAT VIOLATION OF CONSTITUTIONAL RIGHTS RESULTS IN UNFAIRLY OBTAINING INCRIMINATING TESTIMONY USED AGAINST THE PETITIONER.

Although it is generally held that one may not assert the violation of another's Constitutional rights because such rights are personal to the individual aggrieved, such is a rule of practice rather than a fundamental principal embodied in the Constitution. United States v. Raines, 362 U.S. 17 (1960). The aim of the Constitutional prohibition against the use of self-incriminating confessions, unless they are voluntarily made, is to exclude false evidence. Lisenba v. People of State of California, 314 U.S. 219, 236 (1941). The Federal

Judiciary has recognized that the testimony of an accomplice is inherently less reliable than that of other witnesses and should be viewed with caution. United States v. Lee, 506 F.2d 111 (D.C.Cir., 1974); United States v. Davis, 439 F.2d 1105 (9th Cir., 1971); and Tillery v. United States, 411 F.2d 644 (5th Cir., 1969). Thus, it has been held that in close cases it is error for a federal court to refuse to give a cautionary instruction concerning the testimony of an accomplice as "[t]he need for careful scrutiny of an uncorroborated accomplice reflects the danger, underscored by experience, that he may be giving a false account to secure lenient treatment." United States v. Lee, 506 F.2d 111, 119 (D.C.Cir., 1974)(Footnote omitted).

The basis underlying the proscription of involuntary confessions and the necessity to give a jury cautionary instructions concerning accomplice testimony in close cases is basically the same. Fundamental fairness required by the Fifth and Fourteenth Amendments to the United States Constitution requires safeguards against the use of testimony and evidence carrying a significant risk of conviction in cases where experience has shown such testimony also has a significant risk of being untruthful.

The State of Kansas has stipulated that the Constitutional rights of Ray Emerson Meeks were violated. There is no specific mention in the stipulation as to what Constitutional rights were violated, however, the stipulation does recite facts showing that the Constitutional guarantee against self-incrimination was, indeed, the right violated by the Wichita Police Department and the State of Kansas.

The question concerning the inherent trustworthiness of the statement given by

Meeks is not dissipated because he testified at trial, but rather compounded by that fact in view of the further fact that he was an accomplice obviously seeking lenient treatment. Thus, on the stipulated facts, the court below should have ruled that the Petitioner had standing under the Fourteenth Amendment to raise the Constitutional rights denied Meeks, and, at that point, the Court should have either suppressed the testimony of Meeks on the basis of the record before it or ordered further inquiry to determine whether fundamental fairness under the Fourteenth Amendment required the testimony to be suppressed.

II.

THE TESTIMONY OF RAY MEEKS, THE ALLEGED ACCOMPLICE, SHOULD HAVE BEEN SUPPRESSED FOR THE REASON THAT IT WAS OFFERED WHILE MEEKS WAS IMPROPERLY DOMINATED AND CONTROLLED BY LAW ENFORCEMENT OFFICIALS.

The stipulation entered into by counsel for the Petitioner and the State of Kansas prosecutor simply states that the Constitutional rights of Meeks were violated. This violation permeated all statements given within the framework of the agreed statement of facts following the stipulation. With respect to the time when the statements which incriminated the Petitioner were given by Meeks, it is clear that the prosecutor was in the process of conducting lengthy interviews without Meeks having ever spoken to his court-appointed attorney. Although Meeks had been promised immunity after being threatened with various crimes, including murder and kidnapping, the agreed statement of facts is silent as to whether such immunity was ever granted, nor on appeal was a claim made that such immunity

was actually extended. Thus, it would seem clear that not only did the violation of Meeks' Constitutional right against self-incrimination continue through the investigative stage of the proceedings against Petitioner, but at the time of his testimony in the Petitioner's trial, he could have still been prosecuted for murder and kidnapping. The record does not reflect whether the prosecutor ever conferred with the court-appointed attorney for Meeks or discussed immunity with him, and it is clear that his attorney did not discuss that possibility with Meeks. Hence, the only person who could have advised Meeks as to the fact that he could still have been subject to substantial criminal charges was the prosecutor.

In Bradford v. Johnson, 354 F.Supp. 1331 (E.D.Mich., 1972) the Court held that testimony given by an accomplice at the defendant's trial was untrustworthy under due process standards. Although the accomplice was physically tortured in that case, the underlying consideration should be trustworthiness of the testimony given. In this case, the alleged accomplice was under the control of the prosecutor not because of legitimate negotiations between Meeks, his lawyer, and the prosecutor, but instead because of a continuing violation of his Constitutional rights. Under these circumstances, the testimony of Meeks should have been suppressed or, at the very least, because of facts made known to the Court, further inquiry should have been made.

III.

DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRED, UNDER THE CIRCUMSTANCES OF THIS CASE, A

CAUTIONARY INSTRUCTION CONCERNING THE TESTIMONY OF MEEKS.

It is recognized that the administration of criminal justice is predominately committed to the care of the States. On the other hand, convictions cannot result from methods which offend a sense of justice. Rochin v. People of California, 342 U.S. 165 (1952). Fundamental fairness required under the Fourteenth Amendment in the conduct of State trials should not result in a pure either or proposition with respect to accomplice testimony. Is the only requirement of due process under these facts to be whether the testimony is so untrustworthy as to render it totally inadmissable, or falling short of complete exclusion under all circumstances, should such unconstitutionally obtained testimony have been admitted but only with the use of accompanying cautionary instructions based upon the inherent unreliability of such testimony? The Petitioner believes that the standards of due process are not so rigid as to require such an unfair result. Rochin v. People of California, 342 U.S. 165 and United States v. Lee, 506 F.2d 119 (D.C.Cir., 1974).

In this case, based upon the facts brought to the attention of the courts below concerning the violations of the Constitutional rights of Ray Emerson Meeks, and in view of the Court's further failure to order additional inquiry, it would seem clear that due process under the Fourteenth Amendment to the Constitution of the United States would require the use of a cautionary instruction such as the one timely requested by the Petitioner.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Kansas as reported in State v. Moody, 223 Kan. 699, ___P.2d___ (1978) and, further, to review that Court's denial of Petitioner's Motion for Rehearing, dated May 10, 1978.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,
vs. No. 48,671
MELVIN V. MOODY,
Appellant.

APPEAL FROM SEDGWICK
DISTRICT COURT, DIVISION NO. 5

The opinion of the court was delivered by

McFarland, J.: Melvin V. Moody was convicted by a jury of conspiracy (K.S.A. 21-3302) to commit aggravated burglary and aggravated robbery. The information contained thirty counts involving five men. The defendant was charged with a single count of conspiracy and tried separately. This appeal involves only the one count and trial thereon. A sixth man, Ray E. Meeks, was granted immunity, was not charged, and was the primary witness against defendant.

The testimony of Ray Meeks may be summarized as follows: On March 4, 1975, he was present at a meeting between Stephen F. Smallwood and the defendant. The purpose of the meeting was to bring Smallwood and his associates into a robbery and burglary Moody was planning. The property sought was $180,000.00 worth of coins. Moody said he

wanted half of the loot because he was going to be required to pay $600.00 for a key. Smallwood and Meeks agreed to participate. Smallwood and defendant were to meet at a location unknown to Meeks the following day for some unknown purpose in connection with the robbery. The following day Meeks was at Smallwood's home. Smallwood and Hardyway left "to take care of some business." When they returned, the conversation indicated they had been working on the robbery plan. Meeks was shown a key by Smallwood. Meeks and three other participants drove to the Pawnee Plaza Mall on March 8, 1975, to familiarize themselves with the scene (the coin and stamp exhibits were located there). They settled on the robbery plan and drove the planned escape route several times and decided the robbery would occur at midnight that night. In the early morning hours, on their way to commit the crimes, the four men were stopped by the police. Smallwood escaped but the remaining three were arrested for unlawful possession of firearms. Meeks' only contact with the defendant relevant to this case was the March 4 meeting.

Other evidence presented by the state was the testimony of personnel of the shopping center who saw three men acting suspiciously on March 5. Two of the men were black and one was white. One of the witnesses knew Smallwood and identified him at trial as being one of the men he saw. This witness also knew the defendant but could not identify him as the white man present, but stated he only saw the man at a distance of 60 to 70 feet. He said he thought the other black man was a James Trotter. At trial he was shown photographs of Hardyway (a co-conspirator) and Trotter and testified they were similar. The three men were

followed back to their car, a cream or tan over metallic brown 2-door 1971 or 1972 Buick Riviera bearing license tag SGM 12051. Meeks testified he had seen defendant driving a vehicle that fit that description. The tag in question had been issued to defendant for a 2-door 1972 Buick.

The defendant raises a number of points on appeal. The defendant first claims error in the admission of the testimony of co-conspirator Meeks without independent proof of a conspiracy. The defendant relies on K.S.A. 60-460(i) as interpreted in State v. Nirschl, 208 Kan. 111, 490 P.2d 917, as follows:

> "An out of court declaration is admissible, as against a party, if the statement concerns a matter within the scope of an agency or employment of the declarant for that party, and was made before the termination of the relationship. However, evidence extrinsic to the out of court declaration must be in the record to establish some substantial factual basis that an agency or employment existed before hearsay evidence may be admitted as an exception to the rule.
>
> Where an out of court declaration concerns a conspiracy to commit a crime and is relevant to its subject matter and made during the existence of the conspiracy, evidence extrinsic to such out of court declaration must be in the record to establish some substantial factual basis of the existence of such conspiracy, before hearsay evidence by a third party

witness or witnesses may be admitted as an exception to the rule. (K.S.A. 60-460[i][2],)" (Syl. 1,2.)

Meeks was not testifying to what a third party told him the defendant said. Meeks personally heard the conversation.

The precise question raised here was before this court in State v. Roberts, 223 Kan. 49, 574 P.2d 164, wherein we said:

"Appellants have misinterpreted the statute and its case law. K.S.A. 60-460(i) addresses a third party situation. Its requirements apply when the party (defendant) and the declarant (coconspirator) are participating in a plan to commit a crime and a third person (witness) is later called to testify as to the coconspirator's statements made outside the presence of the defendant concerning the conspiracy for the purpose of establishing defendant's participation in the conspiracy and crime. As previously pointed out the theory of admissibility is that each party to the conspiracy becomes an agent for the others. Therefore as an agent his statements to a third person bind not only himself but the others for whom he is acting. Under this theory of admissibility the conspiracy out of which the agency arises must be proven before the third party may testify against a coconspirator as to the declarant's statements made in the absence of the defendant-coconspirator.

"This is not such a case. The statements here were made in the presence of all conspirators. The statements were not made to a third party. A conspiracy is an agreement with another person to commit a crime or to assist in the same. The statements of persons present when the conspiracy is being consummated are admissible as matters accompanying an incident to the transaction or event; as such they are part of the res gestae. Such statements by which the agreement was reached may be established by the testimony of anyone present when the agreement was alleged to have been entered into. . . ." (p.60.)

The trial court did not err in permitting Ray Meeks to testify without prior proof of a conspiracy.

The defendant's second claim of error is the refusal of the trial court to give special instructions to the jury regarding their consideration of the testimony of Ray Meeks. This point covers two areas. First, defendant claims a limiting instruction should have been given prior to the Meeks testimony. The defendant did request an instruction be given during the trial, but it is unclear as to the area on which he wished the jury to be instructed. The request appears to be for an instruction on what overt acts the state had to prove. The defendant further argues such a limiting instruction is mandatory even in the absence of a request. The cases cited by defendant in support of this position relate to factual situations where testimony is introduced that is admissible to some, but not all, of

the defendants on trial or admitted for a limited purpose. The defendant in the case herein was the sole defendant, and the admission of Meeks' testimony was not limited. There was no error in failing to give an instruction limiting the jury's consideration of Meeks' testimony prior to its admission.

The second area of this point relates to the refusal of the trial court to include a cautionary instruction on accomplice testimony in the instructions given to the jury at the close of the evidence. This is the most serious issue on appeal. The trial court refused to give such an instruction on the grounds it was an improper comment by the court on the credibility of a witness. The requested instruction was PIK Crim. 52.18 as follows:

> "An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution the uncorroborated testimony of an accomplice witness."

In the trial of a criminal action, failure of the court to instruct the jury that the testimony of an accomplice should be considered with caution does not constitute reversible error when the testimony of the accomplice is fully corroborated and amounts to merely cumulative evidence and where the jury was instructed as to their duty to consicer the weight of the evidence and credibility of witnesses. (State v. Parrish, 205 Kan. 178, Syl. 5, 468 P.2d 143).

The evidence in the case at hand was only partially corroborated. Clearly it was

error not to have given the instruction. The question becomes whether or not the error is reversible error.

It is significant that the court did not give PIK Crim. 52.09 on credibility of witnesses which is as follows:

> "It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified."

Instead, the court gave the following instruction on credibility of witnesses:

> "It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.
>
> "If you find that any witness has wilfully testified falsely concerning any material matter,

you have a right to distrust the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause."

We conclude that the credibility of witnesses instruction as given was sufficiently cautionary as to Meeks to prevent the error of failing to give the requested accomplice instruction from rising to the level of prejudicial or reversible error under the totality of the circumstances of this case.

The defendant's third claim of error relates to the information and may be broken down into three parts. Count 30 of the information states:

"On or about March 4, 1975, to March 9, 1975, Elmer Hardyway, Jr., and Melvin V. Moody did then and there unlawfully, willfully agree with each other and with Ray E. Meeks to commit and to assist to commit the crimes of Aggravated Burglary and Aggravated Robbery, and an overt act in furtherance of the conspiracy was committed, to-wit: on or about March 4, 1975, Stephen F. Smallwood and Ray E. Meeks met with Melvin V. Moody and discussed stealing a coin collection; on or about March 5, 1975, Stephen F. Smallwood and Elmer Hardyway, Jr., met with Melvin V. Moody and traveled to the Pawnee Plaza Mall, Wichita, Sedgwick County, Kansas; and on or about March 8, 1975, Elmer Hardyway, Jr., Donald McQueen, Stephen F. Smallwood and Ray E. Meeks traveled to the Pawnee Plaza Mall, Wichita, Sedgwick

County, Kansas; contrary to K.S.A. 21-3202 (Conspiracy, Class E Felony). . . ."

The corresponding count in the second amended complaint (Count 44) was identical except Smallwood and McQueen were omitted from the "agree" section of the information. McQueen was omitted due to the fact he was not bound over on that count. The state contends the omission of Smallwood was a clerical error. Also, Smallwood had not been apprehended at the time the information was filed. The defense did not object to the failure to include Smallwood in this portion of the count. At the conclusion of the evidence, Smallwood's name was amended into this portion of the information on motion of the state.

The defendant claims this amendment was prejudicial error. This point is without merit. Defendant did not object to the elements instruction which was given on the amended information. The inclusion of Smallwood was no surprise and did not require the defendant to alter his defense.

The defendant next contends the information is duplicitous since conspiracy to commit two crimes is contained in one count. There was a conspiracy to unlawfully acquire possession of a coin collection. The fact that the conspiracy called for two statutes to be violated in accomplishing its objective does not make the count duplicitous. See Troutman v. United States, 100 F.2d 628 (10th Cir. 1938).

The defendant next argues that the information was defective as it failed to clearly state the alleged overt act. It

should be noted that, on motion of the defendant, the first alleged overt act was struck on the grounds it evidenced an "agreement" rather than an overt act. Defendant argues "traveled to the Pawnee Plaza Mall" is not specific enough to apprise him of the overt act as the act was not a criminal act that shows on its face that it was in furtherance of the conspiracy. Although innocent in itself, an overt act is sufficient to complete the crime of conspiracy if performed in the furtherance thereof as the overt act merely manifiests that the conspiracy is at work. (Carlson v. United States, 187 F.2d 366 [10th Cir. 1951], cert. denied, 341 U.S. 940, 95 L.Ed. 1367, 71 S.Ct. 1000.) This point is without merit.

The defendant's fourth and ninth claims of error relate to the sufficiency of the evidence.

The often stated rule for appellate review is:

> "In a criminal case, the issue on appeal is not whether the evidence establishes guilt beyond a reasonable doubt, but whether the evidence is sufficient to form the basis for reasonable inference of guilt when viewed in the light most favorable to the state." (State v. Childers, 222 Kan. 32, Syl. 1, 563 P.2d 999; accord State v. Duncan, 221 Kan. 714, Syl. 2, 562 P.2d 84; State v. Soverns, 215 Kan. 775, 529 P.2d 181).

The state's case stood or fell on whether the jury believed Meeks. It elected to do so. We have no hesitancy in holding that the evidence was sufficient to support the verdict.

The defendant's fifth claim of error is improper remarks of the prosecutor in his closing arguments. The state's theory was that the defendant masterminded the conspiracy but that the actual perpetration of the crimes to be committed was left to others. The defendant was white. The individuals he brought in to physically commit the crimes were black. The state argued that this was not by accident as an all-white jury such as heard this case would be less likely to convict a white man on a black man's testimony. Any comment, racial in nature, is dangerous ground in closing arguments. No objection was made to these remarks. Defendant further complains of the comment of the prosecutor in closing argument on the defendant's failure to explain away the presence of his license tag at the shopping center on March 5. No objection was made. It is the general rule that reversible error cannot be based on misconduct of counsel in closing summation where no objection was entered at the trial and no request was made that the jury be admonished to disregard the objectionable conduct or statements. (State v. Anicker, 217 Kan. 314, Syl. 2, 536 P.2d 1355; State v. Ralls, 213 Kan. 249, 250, 515 P.2d 1205; State v. Fleury, 203 Kan. 888, 896, 457 P.2d 44.)

In summing up a case before a jury, counsel may not introduce or comment on facts outside the evidence, but reasonable inferences may be drawn from the evidence and considerable latitude is allowed in discussing it. Counsel may appeal to the jury with all the power and persuasiveness his learning, skill and experience enable him to use. (State v. Baker, 219 Kan. 854, Syl. 9, 549 P.2d 911; State v. Wilkins, 215 Kan. 145, Syl. 3, 523 P.2d 728.)

The remarks further imply that defendant had used black people in this manner on previous occasions. The implication defendant had committed other crimes was cured on objection.

In the context of this case, which stood or fell on the weight the jury afforded the testimony of Meeks and the nature of the state's theory, we hold that the trial court did not err in overruling defendant's motion for a new trial on the grounds of improper remarks of the prosecutor during closing argument.

The defendant's sixth claim of error, also, involves the closing arguments of the prosecutor. The defense in the case was alibi. Some alibi witnesses dated their testimony as being the day of or the day following election day. Defense counsel in his closing argument stated there was only one election day that year. In his final argument, the prosecutor stated there were two election days--March 4, 1975, and another one three weeks later. No contemporaneous objection was made by defense counsel. The law in this respect is quite clear. There is no prejudicial error when the questionable statements of a prosecuting attorney are provoked and made in response to previous arguments or statements of defendant's attorney. (State v. Cippola, 202 Kan. 624, 628, 451 P.2d 199, cert. denied, 396 U.S. 967, 24 L.Ed. 2d 432, 90 S.Ct. 446; State v. Magee, 201 Kan. 566,570,441 P.2d 863.) This point is without merit.

The defendant's seventh claim of error is the admission of Meeks' testimony which the defense contends was obtained after Meeks' constitutional rights were violated. We will not set forth the details of this

allegation as the same point was determined adversely to the defendant in the appeal of a co-defendant who was tried separately. See State v. Smallwood, 223 Kan. 320, 574 P.2d 1361, for the particulars on this point. The defendant herein, like Smallwood, has no standing to assert Meeks' rights.

The defendant's eighth claim of error was the admission of evidence of acts occurring after the conspiracy. The defendant takes the position that the conspiracy ended when the planning stage was completed and that the evidence of the men's preparation to commit the crimes and their arrest on the way to the scene was inadmissible. Included in the evidence admitted over objection were the guns seized from the men when the vehicle was stopped. The defendant was charged with conspiracy to commit aggravated burglary and aggravated robbery. This point is considered and found to be without merit.

The judgment is affirmed.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, Appellee,)
)
v.) No. 48,671
)
Melvin V. Moody, Appellant.)
)

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

Considered and DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date May 10, 1978

AFFIDAVIT OF SERVICE

JAMES Z. HERNANDEZ, being first duly sworn, deposes and states:

That in accordance with Rule 33(2)(e), Supreme Court Rules, he has forwarded three (3) copies of the following listed documents to E. Edward Johnson, United States Attorney for the District of Kansas, Federal Building, Wichita, Kansas, 67201 and to the Solicitor General, Department of Justice, Washington, D.C., 20530, on this 7th day of August, 1978.

(1) Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas;

(2) Affidavit of Service.

James Z. Hernandez

JAMES Z. HERNANDEZ
600 Century Plaza Building
Wichita, Kansas 67202
(316)263-4958
Attorney for Appellant

Subscribed and sworn to before me this 7th day of August, 1978.

Saundra J. Parks, Notary Public

My Term Expires:

Sept. 26, 1980